Supreme Court, U.S.
FILED

No. 02 1406 MAR 17 2003

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IN THE

Supreme Court of the United States

CALLOWHILL CENTER ASSOCIATES, LLP,

Petitioner,

v.

SOCIETY CREATED TO REDUCE URBAN BLIGHT; MARY CRAWLEY TRACY; OLD CITY CIVIC ASSOCIATION AND KENSINGTON SOUTH NEIGHBORHOOD ADVISORY COUNCIL,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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Dated: March 17, 2003

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the City of Philadelphia's Sign Controls are unconstitutionally vague as applied to wall wrap displays?

2. Whether the City of Philadelphia's prohibition of all wall wrap displays while permitting murals to exist unregulated violates Petitioner's First Amendment right to enjoy freedom of speech and Petitioner's right to enjoy the equal protection of the law?

LIST OF PARTIES TO THE PROCEEDING

Petitioner is Callowhill Center Associates, LLP ("CA"), the legal owner of the subject property.

Respondents appear in the caption of case on the cover page as follows:

Society Created to Reduce Urban Blight;
Mary Crawley Tracy, individually;
Old City Civic Association;
Kensington South Neighborhood Advisory Council.

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OPINIONS BELOW

1. Order of the Supreme Court of Pennsylvania dated December 17, 2002 denying Petitioner's Petition for Allowance of Appeal; No. 420 EAL 2002, Allocatur Docket, Supreme Court of Pennsylvania

2. Opinion and Order of the Commonwealth Court dated July 11, 2002, No. 3031 CD 2001, Commonwealth Court of Pennsylvania

3. Opinion of the trial court, Court of Common Pleas, Philadelphia County, April Term, 2001, No. 4486 dated February 4, 2002

4. Findings of Fact and Conclusions of Law of the Philadelphia Zoning Board of Adjustment dated July 24, 2001

BASIS FOR JURISDICTION

The order of which Petitioner seeks review is the Order of the Supreme Court of Pennsylvania was issued on December 17, 2002.

Pursuant to Rule 13 of the Rules of the United States Supreme Court, a Petition for writ of Certiorari to review a judgment in a civil case entered by a state court of last resort is timely when filed with the Clerk of the Court within 90 days after entry of judgment. (See Rule 13(1) (see 28 United States Code, §2101(c)). Therefore, the last date for filing an appeal from the subject order in this case is March 17, 2003.

RELEVANT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in relevant part as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Section 14-102(86)(k) of the Philadelphia Zoning Code provides as follows:

> (k) *Outdoor Advertising or Non-Accessory Sign.* A sign which directs attention to a business, industry, profession, commodity, service, organization, activity, institution, product, or entertainment neither sold, located nor offered upon the property where the sign is situated.

Section 14-506 of the Philadelphia Zoning Code is set forth verbatim in Appendix.

Section 14-1604 of the Philadelphia Zoning Code is set forth verbatim in Appendix.

Section 14-1604.1 of the Philadelphia Zoning Code is set forth verbatim in Appendix.

STATEMENT OF THE CASE

This is an appeal from the order dated December 17, 2002 of the Supreme Court of Pennsylvania denying Petitioner's Petition for Allowance of Appeal. This decision left in place the order of the Commonwealth Court of Pennsylvania dated August 21, 2002, denying Petitioner's Motion for Reconsideration/Reargument of its Opinion and Order of July 11, 2002, affirming the Order of the Court of Common Pleas of Philadelphia County (the trial court) of November 27, 2001. The trial court's November 27, 2001 order reversed the decision of the Philadelphia Zoning Board of Adjustment (the "Board") dated April 5, 2001. In its April 5, 2001 decision, the Board granted dimensional and use variances to Petitioner for the erection of one 65 foot by 140 foot, non-accessory, externally illuminated wall wrap display (the "subject wall wrap") on the south side of a seven-story building located at 413-53 North 7th Street, Philadelphia, Pennsylvania. In deciding the appeal, the Commonwealth Court: (1) failed to consider Petitioner's arguments that the applicable Zoning Code provisions are unconstitutional; (2) ruled that the sign Controls of the Philadelphia Zoning Code apply to the wall wrap in question; and (3) ruled that the Philadelphia Zoning Board of Adjustment erred as a matter of law in granting the variances to Petitioner.

The Zoning Board Hearing was held on February 14, 2001. There, Petitioner argued that the Zoning Code provisions applicable to signs were not applicable to wall wraps, the same argument being made in this Petition. At the hearing it was established that wall wrap is a relatively new form of display, unlike traditional signs and billboards. The evidence established that wall wraps are identical in all significant respects with wall murals which are plentiful throughout the City of Philadelphia and which are unregulated. It was also established that wall wraps were not contemplated when the Philadelphia City Council

adopted the Sign Controls and are not treated as a use governed by the Zoning Code.

Respondents appealed the Board's decision to grant dimensional and use variances to Petitioner to the Court of Common Pleas of Philadelphia County. In its brief before the trial court, Petitioner again raised the constitutional challenges involved in this Petition, i.e., that the sign control provisions of the Zoning Code could not be constitutionally applied to the subject wall wrap and that Petitioner should be entitled to receive equal protection under the law with owners of buildings which display murals, to which the subject wall wrap was akin.

The trial court erroneously ruled that the constitutional challenges were waived as not having been presented to the Board, even though as a matter of law, the Board could not invalidate a City ordinance. The trial court was in error as, the constitutional challenges were presented to the Board. Further, under Pennsylvania law, constitutional challenges could be presented to the trial court for consideration for the first time, even if not presented to the Board. *Norate Corp., Inc. v. Zoning Bd. of Adjustment of Upper Moreland Twp.*, 417 Pa. 397, 207 A.2d 890, 893 (1965); *Eller v. Board of Adjustment of London Britain Twp.*, 414 Pa. 1, 4-5, 198 A.2d 863, 865 (1964). Petitioner also contends that, when your very plea is of the right to speak, there can be no rule of law that you have waived that right on any level, constitutional or otherwise. Here, Petitioner asserted the right to speak, through the use of the subject wall wrap display, before the Board.

Petitioner contends, as set forth in Rule 10(c) of the Rules of the Supreme Court of the United States, that the Supreme Court of Pennsylvania has decided this matter contrary to the relevant decisions of this Court on important federal questions. Petitioner contends that:

(1) The City of Philadelphia's Sign Controls are unconstitutionally vague as applied to wall wrap displays;

(2) The City of Philadelphia's prohibition of all wall wrap displays while permitting murals to exist unregulated violates Petitioner's First Amendment right to enjoy freedom of speech and Petitioner's right to enjoy the equal protection of the law; and

(3) Petitioner's First Amendment rights were not waived as a matter of law.

ARGUMENT

A. The City of Philadelphia's Sign Controls are Unconstitutionally Vague as applied to Wall Wrap displays

Petitioner's due process rights were violated as Petitioner and those similarly situated received no prior notice that the courts would deem wall wraps to be signs regulated by the Philadelphia Zoning Code, Sign Controls. Due process requires that sanctions may be imposed on individuals only if they could reasonably have known in advance that their questioned behavior had been proscribed. A statute may be deemed void for vagueness, on it face or as applied, in order to ensure that individuals are fairly informed in advance regarding the specific conduct which a legislature has prohibited. *Smith v. Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294 (1972).

The factual record supports the legal conclusion that no one could reasonably have contemplated that the Philadelphia Zoning Code Sign Controls would be deemed applicable to wall wraps. The characteristics of a wall wrap display that differentiate it from an outdoor advertising sign, or any other sign, which are stark, are present throughout the record.

The wall wrap is made of a translucent mesh fabric, unlike signs. Wall wraps, as murals, are physically attached to the Building's facade. There is no support structure for the wall wrap. Exhibits were introduced before the Board

detailing the subject wall wrap, as well as other wall wrap displays located throughout the country. Testimony established that in other jurisdictions, wall wrap displays are viewed as a use different from outdoor advertising signs.

The Controls are not applicable because the wall wrap is not an outdoor advertising sign within the contemplation of the Controls. Although the lower courts concluded that the wall wrap was an outdoor advertising sign as defined by Section 14-102(86)(k) of the Philadelphia Zoning Code, the Controls did not contemplate wall wrap displays, which did not exist when the Controls were established. The Controls were enacted to regulate billboards and their negative secondary effects. See as examples Phila. Code §§ 14-1604(1)(I) and (m), which provide that a goal of the Controls is to protect views of the skyline, etc. Neither wall wraps nor murals affect the skyline.

An examination of the Controls' public safety goals further illustrates the point that the Controls did not contemplate wall wrap displays. There is no nexus between the stated public safety goals found in Section 14-1604(1) and wall wrap displays. Wall wraps do not block view corridors, do not cast dark shadows on city streets, nor do they block traffic signs or attract litter and crime. In the instant matter, the stated public safety goals are even more attenuated. The subject wall wrap is located in an industrial area, far from any residential neighborhoods. The subject wall wrap does not advertise alcoholic beverages, tobacco or other vices.

It is clear from the record in this case that wall wraps were not contemplated when the Philadelphia City Council adopted the Controls and are not treated as a use governed by the Zoning Code.

Finally, because wall wrap displays are not signs within the contemplation of the Controls and are not specifically prohibited in the L-4 Limited Industrial Zoning District, or any other zoning district or overlay, the wall wrap is

permitted as of right. The plain language of Section 14-506, which contains the applicable use restrictions, does not simply permit certain enumerated uses and exclude all others. *See*, Phila. Code § 14-506(1). To the contrary, Section 14-506(1) specifies both permitted L-4 uses (Section 14-506(l)) and prohibited L-4 uses (Section 14-506(1)(a)).

Thus, the factual record contains a wealth of evidence to support the conclusion that no one could have reasonably contemplated that the Philadelphia Zoning Code Sign Controls would be deemed applicable to wall wraps. Due to the lack of notice to Petitioner that wall wraps would be so proscribed, the Controls are unconstitutionally vague, at least as applied, and violate the due process rights of Petitioner. See: *United States v. Powell*, 423 U.S. 87, 96 S.Ct. 316(1975); *United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710(1975).

B. The City of Philadelphia's Prohibition of all Wall Wrap displays violates Petitioner's First Amendment right to enjoy Freedom of Speech and Petitioner's right to enjoy the Equal Protection of the Law

Stated somewhat broadly, this case involves the right of government to regulate, indeed, prohibit, the use of "wall wraps" for the expression of ideas. This Court, in *Meteromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505, 101 S.Ct. 2882 (1981), which involved billboards, observed as follows:

> This Court has often faced the problems of applying the broad principles of the First Amendment to unique forms of expression.

Id., at 101 S.Ct., 2889. In applying these principles in various cases, this Court has held ". . . at times First Amendment values must yield to other societal interest." *Id.*

Thus, recognizing that government may legitimately regulate the non-communicative aspects of vehicles which

involve communicative and non-communicative components, this Court also observed that "the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects." *Id.*, at 2890. Courts are therefore *duty bound* to evaluate the constitutional impact imposed by regulation, which require a particularized inquiry into the conflicting interests at stake and the specific character of the regulations involved. *Id.* This duty is imposed upon the courts at every level when the right to speak is at issue. Thus, this Court's pronouncement of this duty condemns the decisions of the state courts in this case to declare a waiver of the constitutional assertion of the right to speak, when the heart and letter of Petitioner's application before the Zoning Board was the constitutionally protected right to speak. How could it have been waived?

This Court's expression of this duty to evaluate the First Amendment interests in Meteromedia was not a new pronouncement. In *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 91, 97 S.Ct. 1614, 1617 (1977), this Court stated:

> [A] court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.

Here, the state courts violated the duty imposed by this Court. Had the state courts embraced this duty, it would have found that Petitioner's constitutional rights had been violated. The analysis the state courts avoided follows below.

Commercial speech, as with noncommercial speech, is entitled to free speech protections, *Id.* at 2892-2895, although traditionally commercial communications are afforded less constitutional protection that other forms of protected communication. *Id.* at 2892. The protection afforded commercial speech turns on the nature of the expression and the governmental interest to be served by the regulation. *Id.* Thus, in *Central Hudson Gas & Electric*

Corp. v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343 (1980), this Court established a four-part test for determining the validity of governmental regulation upon commercial speech as opposed to more fully protected speech: (1) the speech must be lawful and not misleading; (2) the restriction on otherwise valid speech must seek to implement a substantial governmental interest; (3) the regulation must directly advance that interest; and (4) the regulation must reach no further than is necessary to accomplish the given objective. *Id.*, 100 S.Ct. at 2350.

This appeal does not question the right of the government to regulate the commercial speech involved in this case. This appeal involves a clear and unequivocal principal recognized by this Court in *Metromedia*, to wit: when commercial speech, and noncommercial speech are expressed in a similar fashion, the government may not constitutionally prohibit one and permit the other.

In *Meteromedia*, this Court considered a San Diego ordinance which permitted commercial billboards to be displayed in a given area, with exceptions, but which prohibited noncommercial billboards from being displayed at all. This Court observed:

> The use of onsite billboards to carry commercial messages is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited.

Id. at 2895. Finding that the City did not explain how or why noncommercial billboards would be more threatening to safety and welfare than commercial billboards, this Court concluded:

> Insofar as the City tolerates billboards at all, it cannot choose to limit their content to commercial messages; the City may not conclude that the communication of commercial information . . . is of greater value than the communication of noncommercial messages.

Id. at 2895.

This Court concluded that, because the San Diego ordinance "reaches too far into the realm of protected speech" the ordinance was unconstitutional on its face, as violative of the First Amendment. *Id.* at 2899.

Here, murals are permitted throughout the City as an unregulated use, while wall wraps are prohibited. The record below clearly establishes that the wall wrap is akin to a wall mural. The wall murals seen throughout Philadelphia have many attributes similar to wall wraps. They are comparable in size, with wall wrap typically being even larger. By their size alone, they are distinctly distinguishable from traditional signs. Both are non-accessory in nature. Both are physically attached to a building's facade. Both are frequently illuminated. Neither the wall wrap nor the mural are signs as defined by the Philadelphia Zoning Code. (See Section "A" above). Both murals and wall wraps convey messages – one commercial in nature, one expressive, and both are protected under both the First and Fourteenth Amendments of the U.S. Constitution. *Meteromedia, Inc. v. City of San Diego, supra.*

The position of the lower courts does not meet the test established by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, supra, for determining the validity of governmental regulation upon commercial speech. First, the wall wrap in question is lawful and not misleading. Secondly, since the speech is lawful, there is no substantial governmental interest in banning all wall wraps. Signs, as defined in the law, and the articulated interests sought to be achieved by sign regulation is not served by banning wall wraps. As proof, such articulated interest cannot be achieved by banning wall wraps but permitting murals, between which there is no significant distinction. As a result, the third test has not been met since banning wall wraps but permitting murals does not advance any purported interest. Finally, the forth test cannot be met since the regulation reaches much further than is necessary

to accomplish the given objective. No distinction is made in the regulations between wall wraps which are identical to murals and those which may be distinguished. This broad sweep bars legitimate speech by any stated set of standards which permits murals to be displayed. In other words, the ordinances in this case reach "too far into the realm of protected speech." *Meteromedia*, supra., at 2899.

As a result, Petitioner's First amendment rights have been violated as well as Petitioner's right to enjoy the equal protection of the laws in violation of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons and in the interest of justice, Petitioner respectfully prays that this Court grants this Petition and accepts this appeal.

Respectfully submitted,

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Attorneys for Petitioner

Dated: March 17, 2003

[LOGO]

Supreme Court of Pennsylvania

Eastern District

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Patricia A. Johnson
Chief Clerk

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December 17, 2002

Luther E. Weaver, II, Esq.
Bowser & Weaver PC
250 S 16th Street
Philadelphia, PA 19102

RE: SCRUB, et al v. ZB of Adj., et al
No. 420 EAL 2002

Dear Attorney:

Enclosed please find a certified copy of an order dated December 17, 2002 entered in the above-captioned matter.

Very truly yours,

Office of the Prothonotary

PAJ

cc: Cheryl L. Gaston, Esq.
Samuel C. Stretton, Esq.
The Honorable Matthew D. Carrafiello
Judge

IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

SOCIETY CREATED TO REDUCE URBAN BLIGHT, MARY CRAWLEY TRACY, OLD CITY CIVIC ASSOCIATION, AND KENSINGTON SOUTH NEIGHBORHOOD ADVISORY COUNCIL	:	No. 420 EAL 2002
	:	Petition for Allowance of Appeal from Order of the Commonwealth Court
v.	:	
THE ZONING BOARD OF ADJUSTMENT, THE CITY OF PHILADELPHIA, CALLOWHILL CENTER ASSOCIATES AND METRO LIGHTS, LLC,	:	
PETITION OF: CALLOWHILL CENTER ASSOCIATES AND METRO LIGHTS, LLC	:	

ORDER

PER CURIAM

AND NOW, this 17th day of December, 2002, the Application for Stay and Injunctive Relief is denied. The Petition for Allowance of Appeal is denied.

TRUE COPY FROM RECORD

Attest: Dec 17 2002

/s/ Patricia Johnson

Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania,
Eastern District

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Society Created to Reduce Urban Blight, Mary Crawley Tracy, Old City Civic Association, and Kensington South Neighborhood Advisory Council	:	
v.	:	No. 3031 C.D. 2001
The Zoning Board of Adjustment, The City of Philadelphia, Callowhill Center Associates and Metro Lights, LLC	:	Submitted: June 12, 2002
Appeal of: Callowhill Center Associates and Metro Lights, LLC	:	

BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge HONORABLE BERNARD L. McGINLEY, Judge HONORABLE ROBERT SIMPSON, Judge

OPINION
BY JUDGE SIMPSON FILED: July 11, 2002

Callowhill Center Associates and Metro Lights, LLC (Applicants) appeal an order of the Court of Common Pleas of Philadelphia County (trial court) reversing; the grant of a variance to erect an outdoor advertising sign by the Zoning Board of Adjustment of the City of Philadelphia (Board). We affirm.

In 1999, Applicants erected a 65 foot by 100 foot non-accessory sign on the wall of a building located on North 7th Street in Philadelphia. In February 2000, after the sign had been in place for one year, Applicants applied to the Philadelphia Department of Licenses and Inspections (L & I) for zoning and use permits for a proposed sign, which was identical in proportion to the existing sign. L & I rejected the application because the sign would violate the outdoor advertising requirements of Sections 14-506, 14-1604 and 14-1604.1 of the City of Philadelphia Zoning Code, Phila. Code §§14-506, 14-1604, and 14-1604.1 (zoning code).

Applicants appealed to the Board but did not dispute that the sign violates the zoning code.[1] Instead, they argued that a variance should be granted. They presented the testimony of Myron Berman, a representative of the owner of the building upon which the sign is to be placed. Berman testified that the building had been purchased from the Philadelphia school district in 1986. He noted that, at the time of the hearing, the building was 70 to 80% occupied by commercial tenants. Reproduced Record (R.R.) at 39a.

Berman testified that in 2000 the facade of the building required repair and replacement of windows at a cost of $4.8 million. R.R. at 32a. He explained that rental income was insufficient to fund the building repairs. R.R. at 34a-35a. Berman maintained that the exterior renovations would not have been possible without the sign revenue. R.R. at 34a.

In opposition, the Society Created to Reduce Urban Blight (SCRUB), the Olde City Civic Association, and the Kensington South Neighborhood Advisory Council (collectively Objectors) presented testimony. Objectors argued that the sign was a blight. They also presented the testimony of Gray Smith, an architect and city planner. Smith opined that the sign violated the zoning code and would reduce the

---

1. The sign violates the following provisions of the zoning code:

- It is within the Vine Street Parkway special control area, which is prohibited by Section 14-1604.1(5);
- The property is zoned L-4 industrial; the zoning code does not permit outdoor advertising signs as a use for property within an L-4 industrial zone. Section 14-506(1)(a)(2).
- Applicants propose to remove only 1,478 square feet of existing signs in exchange for the new sign which totals 9,750 square feet; Section 14-1604(10)(a) requires that existing signs of equal or greater area must be removed;
- Section 14-1604(5) sets the maximum sign area at 1,000 square feet; the sign has an area of 9,750 square feet.
- Section 14-1604(6) requires that the bottom edge of the sign be not more than 25 feet above the road surface and that the sign be limited to 20 feet in height above the bottom edge; the sign's bottom edge will measure 45 feet from the road surface, and the top edge will rise 65 feet above the bottom.

quality of the visual and aesthetic environment. Additionally, the Philadelphia Planning Commission submitted a report recommending that the variance be denied in light of the numerous violations of the zoning code.

The Board granted the variance. The Board concluded that the Applicants would suffer an unnecessary hardship if the variance was not granted as their ability to fund the building repairs would be compromised.

On appeal, the trial court reversed, concluding that Applicants did not suffer the required hardship. The trial court reasoned that, because the building was 70 to 80% occupied by commercial tenants when the sign was erected, the loss of the sign revenue did not render the property valueless. In addition, the trial court found that Applicants waived several arguments including a constitutional challenge to Sections 14-1604 and 14-1604.1 of the zoning code. Applicants filed a timely appeal to this Court.

Applicants pose three questions for our review: (1) whether the trial court erred in ruling that they waived arguments that had not been raised before the Board; (2) whether the trial court erred by reversing the Board's grant of a variance; and (3) whether the zoning code is applicable to Applicants' sign.[2]

Initially, we note that Applicants did not challenge the constitutionality of the zoning code before the Board. They argued only that a variance should be granted. After Objectors appealed the grant of the variance to the trial court, Applicants questioned the validity of the zoning code as a prior restraint on commercial speech and as exclusionary zoning. For the reasons set forth below, we conclude that Applicants waived those arguments.

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2. Where, as here, the trial court hears no additional evidence, our review is limited to a determination of whether the board committed an error of law or an abuse of discretion. *Greaton Properties, Inc. v. Lower Merion Township*, 796 A.2d 1038 (Pa. Cmwlth. 2002).

Section 1005-A of the Pennsylvania Municipalities Planning Code[3] provides that, upon motion by the parties, the trial court may receive additional evidence if necessary for proper consideration of the appeal. If parties do not request that the trial court hear additional evidence, they waive arguments which were not raised before the board. *See Segal v. Zoning Hearing Board of Buckingham Township,* 771 A.2d 90 (Pa. Cmwlth. 2001) (applicant's failure to argue entitlement to a *de minimis* variance before the zoning board resulted in waiver since permission was not obtained from trial court to raise new argument); *Myers v. State College Zoning Hearing Board,* 530 A.2d 526 (Pa. Cmwlth. 1987) (where vested right claim was first advanced before the trial court, applicant waived that claim since the record was devoid of any application or motion to have the trial court allow that claim to be raised). This approach ensures that the fact finder has a full opportunity to create a reviewable record on all issues.

Our decision in *813 Associates v. Zoning Hearing Board of Springfield Township,* 479 A.2d 677 (Pa. Cmwlth. 1984) provides additional controlling authority. In *813 Associates* the applicant's sole request before the zoning board was for the grant of a variance. On appeal to this Court after the zoning board denied the variance, the applicant argued that the zoning code was invalid. We held that the applicant's failure to raise those arguments before the zoning board resulted in waiver.

Here, the Board was the fact finder. Applicants failed to raise their constitutional arguments before the Board. As a result, the Board was unable to compile an adequate record for determination of those issues. Likewise, the record reveals no request that the trial court permit enlargement of the record. 53 P.S. §11005-A. The City of Philadelphia was not aware of the attack on the zoning code at a time when it

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3 Act of July 31, 1968, P.L. 805, *as amended,* added by Section 101 of the Act of December 21, 1988, P.L. 1329, 53 P.S. §11005-A.

could create a record in defense of constitutionality. Consequently, the trial court found that the arguments were waived. We agree that Applicants waived all arguments not raised before the Board, including the argument that the zoning code is unconstitutional.

Applicants next contend that the trial court erred by reversing the zoning board's grant of a variance. They maintain that without the sign revenue they would have been unable to fund the exterior repairs and that the loss of the revenue imposes an unnecessary hardship on the building. We disagree.

A party seeking a variance bears the burden of proving that an unnecessary hardship will result if the variance is not granted and also that the variance will not be contrary to the public interest. *Valley View Civic Association v. Zoning Board of Adjustment,* 501 Pa. 550, 462 A.2d 637 (1983). Absent a finding that property will be rendered valueless, financial hardship alone is not a sufficient basis for granting a variance. *Society Created to Reduce Urban Bligh (SCRUB) v. Zoning Board of Adjustment,* 713 A.2d 135 (Pa. Cmwlth. 1998). Property owners do not have a right to utilize land for their highest and best financial gain. *Id.*

We held in several recent decisions that the loss of rental income from disallowed outdoor advertising signs was not an unnecessary hardship. In *Society Created to Reduce Urban Blight (SCRUB) v. Zoning Bd. of Adjustment for the City of Philadelphia,* 772 A.2d 1040 (Pa. Cmwlth. 2001), Conrail sought a variance to erect outdoor sips. The trial court concluded that the board's grant of a variance was improper because the property was being used productively for the railroad business. On appeal, Conrail argued that it would suffer an unnecessary hardship since it would be unable to follow its national advertising practice and would lose income that the signs would generate. In response, we stated:

> This argument is wholly frivolous. The law is well settled that a mere showing of economic hardship or that a property could be utilized more profitably is insufficient to support the grant of a variance.

SCRUB, 772 A.2d at 1044 (citation omitted).

Similarly, in *Society Created to Reduce Urban Blight (SCRUB) v. Zoning Board of Adjustment of City of Philadelphia,* 771 A.2d 874 (Pa. Cmwlth. 2001), the applicants sought a variance for the placement of outdoor advertising signs. They argued that an unnecessary hardship would result from the denial of a variance because the property's use as a sewage treatment plant required a large, unoccupied grassy area and the only other use for the property was to erect outdoor signs. We held that the applicants' inability to use their entire property to maximize their profits was not an unnecessary hardship as the property was already being put to a profitable use.

Pursuant to these decisions, we conclude that the Board erred as a matter of law by granting the variance when Applicants did not demonstrate the required showing of unnecessary hardship. As noted, the building was 70 to 80% occupied by commercial tenants when the sign was erected. The building is being put to a profitable use, and the loss of the sign revenue does not render the building valueless. Because we conclude that Applicants did not prove the required hardship, we need not determine whether a variance would be contrary to the public interest.

Alternatively, Applicants argue that a variance is not necessary because the zoning code does not apply to their sign. They assert that their sign is a wall wrap, which drapes the side of the building like a banner. They claim that the zoning code applies only to billboards.

Reference to the definition section of the zoning code demonstrates that this argument lacks merit. The term "sign" is defined as follows:

> A name, identification, description, emblem, display or structure which is affixed to, or printed on, or represented directly upon a building, structure or parcel of land.

Phila. Code §14-102(86). Our review of the record reveals that Applicants' sign falls within that definition.

Accordingly, we affirm.

/s/ Robert Simpson, J.

ROBERT SIMPSON, Judge

President Judge Colins concurs in the result only.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Society Created to Reduce Urban Blight, Mary Crawley Tracy, Old City Civic Association, and Kensington South Neighborhood Advisory Council	:	
v.	:	No. 3031 C.D. 2001
The Zoning Board of Adjustment, The City of Philadelphia, Callowhill Center Associates and Metro Lights, LLC	:	
Appeal of: Callowhill Center Associates and Metro Lights, LLC	:	

ORDER

AND NOW, this 11th day of July, 2002, the order of the Court of Common Pleas of Philadelphia County is affirmed.

/s/ Robert Simpson, J.

ROBERT SIMPSON, Judge

Certified from the Record

Jul 11 2002

and Order Exit

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), MARY CAWLEY TRACY, OLD CITY CIVIC ASSOCIATION, and KENNSINGTON SOUTH (Appellees)	:	CIVIL TRIAL DIVISION
v.	:	
THE ZONING BOARD OF ADJUSTMENT, THE CITY OF PHILADELPHIA, CALLOWHILL CENTER ASSOCIATES, and METRO LIGHTS (Appellants)	:	April TERM, 2001 NO. 004486

OPINION

Carraliello, J.

Callowhill Center Associates and Metro Lights (appellants), appeal from an order of Common Pleas of Philadelphia reversing the decision of the Zoning Board of Adjustment of the City of Philadelphia (hereafter the ZBA) granting their request for a variance to erect a wall wrap type of outdoor advertising sign.

Relevant Factual and Procedural History:

In late 1999, appellants erected a 65 foot by 140 foot, non-accessory wall wrap sign (the Sign) on the wall of the building at 413-53 North 7th Street in Philadelphia. (For the Court's convenience, photos of the wall prior to the placement of the Sign and after are attached as Exhibits A and B). After the fact, they petitioned the Bureau License and Inspections for a permits to erect the Sign. Their petition was rejected, as that placement of the Sign violated numerous provisions of the City of Philadelphia Zoning Code. An appeal was taken to the ZBA, requesting use and dimensional variances to legalize its placement.

A full hearing was held before the ZBA on February 14, 2001. The Chairman noted the basic facts of the matter prior to receiving testimony. He noted that the total square footage or the Sign was 9,750 feet, whereas the code allowed a maximum of 1500 square feet and that the bottom of the sign was 45 feet above the road surface, contra to the 20 foot limit. He also noted that the code allowed a 20 foot extension from the bottom edge of a sign, but this sign was 65 feet high. He stated for the record that the Sign was attached to a building within the Vine Street Parkway Special Control, and as such was specifically prohibited by Philadelphia Zoning Ordinance §14-1604. (*See* NT 4-5).

Appellants initially called Albert Tantella, a professional engineer, who authenticated a 1998 traffic study of the area and photographs of the building and the Sign. He testified on cross examination that the building was a multi-tenant building housing numerous businesses. He admitted that the traffic study had not been conducted with this Sign or its impact as a consideration. He also noted that the Sign violated several zoning ordinances, both in size and location. (N.T. 13-16)

Appellants then called a representative of the building owner, Myron Berman. Mr. Berman testified that the building had been purchased from the school district 1986, and had undergone numerous repairs at substantial cost to the owners from that date. He indicated that the occupancy rate fluctuated between 70% and 80% with diverse businesses occupying the building. He noted that the facade of the building was in such bad shape that it represented a dangerous condition, and it had been repaired and the windows replaced in 2000. He stated,

> Without the wall wrap revenue, we would not have been able to do the exterior renovations of the facade and the replacement of the windows. And although this building is occupied, and it was functioning, the income was not sufficient to make that dramatic improvement which did not have

any direct impact on the income of the building. (N.T. 29-30)

Appellants closed with the testimony of Barry Rush, who is in the outdoor advertising business and testified that these signs appear throughout the country. He contracted with the building owners to erect the Sign, and although he knew of this city's sign ordinance, no steps were taken to seek approval from the Bureau of License and Inspections prior to its placement.

Appellees, SCRUB and other various community organizations, objected to the Sign and their representatives testified thus. They also presented the testimony of Gray Smith, an architect and city planner, who had prepared a report for the Board. He noted the previously described problems with the Sign, and concluded that he had counted fourteen non-conformities with the Philadelphia Zoning Code. (N.T. 58-61). He opined that the sign might pose a health problem in that it covered the windows, and produces a hazardous gas if burned. He concluded, ". . . and it will also reduce the quality of the visual and aesthetic environment." (N.T. 66).

The Philadelphia Planning Commission did not have its report available at the time of the hearing, but later submitted a report to the ZBA recommending that the variance not be granted in light of the numerous violations of the Zoning Code.

The ZBA issued its Findings of Fact and Conclusions of Law, granting appellants' request for use and dimensional variances, on July 24, 2001. Appellees filed a timely appeal to the Court of Common Pleas where, after the submission of briefs and the presentation of oral argument, the Court issued an Order granting appellees' appeal and reversing the decision of the ZBA. This appeal followed.

Legal Discussion:

Appellants raise numerous issues in their Pa.R.A.P. §1925 (b) Statement of Matters Raised on Appeal that were

not argued before the Board, but were raised for the first time in response to appellees appeal. In essence, they asked this Court to find the controls imposed by the Zoning Code unconstitutional. They also asked this Court to rule that the Sign was not a sign, but a wrap that was outside the realm of the Code's restrictions. Lastly, they asked the Court to rule in the alternative, that the ZBA acted properly in granting the variances.

The Court believes that the Code does not violate constitutional prohibitions in limiting the number of signs that may be placed in various sites around the city. The cases cited by appellants involve absolute prohibitions, or moratoriums halting permissible activities. There is nothing in the record that would support their arguments. In fact, they were seeking a variance that would permit the very act they allege is banned. Had they met their burden of proof, their actions in erecting the Sign would have been upheld by this Court. As their arguments regarding the constitutionality of the controls established by the Code were not raised before the ZBA, nor were they the subject of the appeal before this Court, as well as the Court's belief that they lack merit, they are deemed waived for purposes of this appeal.

> Appellants next argue that the Sign is not a sign, but a mural with words on it:
>
> This billboard, which everyone would agree that it's a mural, except for two things, BANANA REPUBLIC. If it didn't have BANANA REPUBLIC on it, everyone would agree, it's a mural. (N.T. Oct. 17, 2001 p. 18).

It would seem no one agreed with that statement. The ZBA found it to be a sign, not a mural. Appellees believe it to be an outdoor advertising sign. The Philadelphia Zoning Code, in §14-102(86), which contains the definition of a sign, reads: A name, identification, description, emblem, display, device or structure which is affixed to, or printed on, or represented directly or indirectly upon a building, structure,

or parcel or land; . . . . visible or intended to be visible from any public place; and which directs attention to a person, place, product, institution, business, organization, activity or service. Clearly, this definition covers the Sign. However, on examination, Exhibit B provides the clearest evidence that this case involves an outdoor advertising sign, and the Court so ruled.

The final issue that was before the Court was whether the ZBA's action granting appellant's request for use and dimensional variances was an abuse of discretion. It is well established under Pennsylvania law that when the Court does not take additional evidence on appeal from a ZBA decision, the scope of review is limited to determining whether the Board committed an abuse of discretion or an error of law. *See Board of Supervisors of Upper Southampton Twp. v. The Zoning Hearing Board of Upper Southampton Twp.*, 124 Pa. Cmwlth. 103, 555 A.2d 256(1989). Where the ZBA's findings of fact are not supported by substantial evidence, the granting of a variance is an abuse of discretion. *Somerton Civic Assn., v. Zoning Board of Adjustment,* 80 Pa. Cmwlth. 173, 471, A.2d 578 (1984).

In this case, it is not disputed that the Sign, if deemed to be a sign, violates numerous provisions of §14-1604 of the Zoning Code. The only issue is whether appellants established that they would suffer undue hardship if denied the variances. In *SCRUB v. Zoning Board of Adjustment,* Pa. Cmwlth., 772 A.2d 1040 (2001) (Conrail Appeal), at p. 1044, this Court found:

> The standards for granting a variance in Philadelphia are well settled. The party seeking a variance bears the burden of proving that an unnecessary burden will arise if the variance is not granted and that granting the variance will not be contrary to the public interest. Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983). The unnecessary hardship must arise

> from "the particular *physical* surrounding, shape, or topographical conditions of the specific structure or land involved." Section 14-1802 (l)(a) of the Zoning Code (emphasis added).

Mere financial hardship does not justify a variance absent evidence that the property will be rendered valueless. *Valley View Civic Association v. Zoning Board of Adjustment,* 501 Pa. 550, 462 A.2d 637 (1983); *SPC Company Inc. v. Zoning Board of Philadelphia,* Pa. Cmwlth., 773 A.2d 209 (2001).

The testimony of appellant's own witnesses demonstrated that the building was 70% to 80% occupied when the Sign was erected. A desire for additional income to make necessary repairs and improve the appearance of the building is not sufficient hardship under current case law to allow any type of variance. The Supreme Court, in *Hertzberg v. Zoning Board of Adjustment of Pittsburgh,* 554 Pa. 245, 721 A.2d 43 (1998), allowed a more relaxed hardship standard when granting a dimensional variance, if the use was permitted under the Zoning Code.

Here it is clearly not. As appellants failed to demonstrate hardship, this Court need not address the issue of whether the Sign's placement violates public policy. Assuming the Code's provisions reflect public concerns, the numerous violations committed by the placement of the sign, and the strong objections voiced by the community establish that no variance should have been granted. As this record failed to establish hardship as defined by this Court, it was an abuse of discretion for the ZBA to have granted variances in this matter.

BY THE COURT:

/s/ Matthew D. Carrafiello, J.

MATTHEW D. CARRAFIELLO, J.

Date: 2/4/02

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), ET AL Appellant	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
vs.	:	
ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA	:	April Term, 2001
and	:	No. 004486
THE CITY OF PHILADELPHIA Appellees	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE ZONING BOARD OF ADJUSTMENT

This appeal is taken by the above named Appellants from a decision of the Zoning Board of Adjustment of the City of Philadelphia ("Zoning Board"), in the Calendar 00-0250, granting zoning and use variances for the property located at 413-53 North 7th Street, Philadelphia, Pennsylvania ("subject property"). Accordingly, as provided by law, the Zoning Board makes the following Findings of Fact and Conclusions of Law in support of its decision.

FINDINGS OF FACT

1. On February, 2000, legal counsel for Metro Lights ("Applicant") applied to the Department of Licenses and Inspections ("L&I") for zoning and use registration permits for the legalization of a non-accessory, 9,750 square feet, flat wall, outdoor advertising sign, located within the Vine Street Parkway Sign Control Area, on the same building with an existing warehouse on the subject property and proposing not to remove an outdoor advertising sign of equal or greater size. (Application for Zoning and/or Use Registration Permit No. 000128042).

2. L&I determined that Applicant's proposals for the subject property would not comply with the zoning and use regulations for a L-4 Industrial District as set forth in Sections 14-506, 14-1604 and 14-1604.1 of the City of

Philadelphia Zoning Code ("Zoning Code"). Accordingly, L&I issued one (1) zoning refusal and three (3) use refusals on March 14, 2000. L&I also made a note to the Zoning Board that Applicant's outdoor advertising sign was existing on the premises in violation of the Zoning Code. (Notice of Refusal of Permit).

3. Applicant appealed the refusals to the Zoning Board on March 21, 2000. A public hearing was held before a quorum of the Board's members on February 14, 2001. (Petition of Appeal to the Zoning Board N.T. at 1).

4. On April 5, 2001, Applicant was notified in writing that the Zoning Board had granted the requested zoning and use variances for the subject property. (Notice of Decision).

5. On March 12, 1987, the Zoning Board granted a variance allowing a public parking lot warehouse on the subject property. On October 26, 1994, the case involving a request to erect a grain bin accessory to a proposed brewery for malt beverages and soft drinks on the subject property was withdrawn. (Application for Zoning and/or Use Registration Permit No. 115969; Application for Zoning and/or Use Registration Permit No. 940906016).

6. The subject property is a seven-story, end-of-row, commercial structure with an enclosed, public parking lot. The property is zoned L-4. Callowhill Center Associates, LLP ("CCA") is the legal owner of the property. (Application for Zoning and/or Use Registration Permit No. 000128042; Inspector's Report; Deed, Applicant's Exhibit 1).

7. On June 30, 1986, CCA acquired the subject property from the School District of the City of Philadelphia. At the time of CCA's acquisition, the property's physical condition was seriously dilapidated. Subsequently, over a period of years, CCA was able to rent the property and collect the $4,800,000.00 needed to return the structure back to a functional state. However, after it was determined that the property's exterior had to be completely renovated for safety

and aesthetic purposes, CCA was able to generate the necessary funds only by granting Applicant permission to erect a non-accessory, outdoor advertising sign on the property. (N.T. at 9 and 26-30; Deed, Applicant's Exhibit 1).

8. On some undisclosed date, Applicant erected a "wall-wrap" on the subject property. A wall-wrap is a new type of outdoor advertising sign. Instead of being attached to a traditional support frame, a wall-wrap is affixed to the side of a building, covering the structure like a banner. Through some undisclosed process, Applicant became aware that its wall-wrap was existing on the property in violation of the Zoning Code. (N.T. at Application for Zoning and/or Use Registration Permit No. 000128042; Photographic Log, Applicant's Exhibit 2).

9. In order to legalize the existing wall-wrap, Applicant proposes to erect one (1), non-accessory, flat-wall, outdoor advertising sign on the subject property. Applicant's proposed sign would be affixed to the southern side of the seven-story structure and would measure 65 feet in height by 150 feet in width, for a total sign area of 9,750 square feet. The bottom edge of the proposed sign would be 45 feet above Willow Street, the road surface which is located directly below Applicant's sign. (Application for Zoning and/or Use Registration Permit No. 000128042; Site Plan, Applicant's Exhibit 7).

10. Applicant's proposed outdoor advertising sign would be located within the Vine Street Parkway Special Control Area (Application for Zoning and/or Use Registration Permit No. 000128042; Site Plan, Applicant's Exhibit 7; N.T. at 13; City of Philadelphia Zoning Map, Applicant's Exhibit 8).

11. Instead of removing one (1), outdoor advertising sign with a sign area equal to or greater than the proposed sign, Applicant proposes to take down ten (10) of its outdoor advertising signs existing in the City of Philadelphia. The total sign area for the signs to be removed would equal 1,478

square feet. (Applicant's Addendum; Take Downs, Applicant's Exhibit 14; Photographic Log, Applicant's Exhibit 2).

12. The subject property is situated on the northeast corner of the intersection of 7th and Willow Streets. The surrounding area is comprised purely of commercial and industrial properties. (Application for Zoning and/or Use Registration Permit No. 000128042; Site Plan, Applicant's Exhibit 7; City of Philadelphia Zoning Map, Applicant's Exhibit 8; Photographic Log, Applicant's Exhibit 2).

13. Albert M. Tantala, a licensed engineer, testified that Applicant's wall-wrap was erected in compliance with the City of Philadelphia Building Code. In addition, Mr. Tantala testified that the material utilized in Applicant's wall-wrap has a very, low flame spread and does not impair the view or the block the light or air of the subject property's tenants. (Tantala's Resume, Applicant's Exhibit 9; Tantala's Reports, Applicant's Exhibit 10; N.T. at 9-25).

14. Mr. Myron J. Berman, the representative for CCA, testified that the existing wall-wrap does not obstruct his tenants' views nor does it impede the flow of light or air to the property. In addition, Mr. Berman testified that he has received positive feedback from the his tenants and from members of the community regarding the sign's aesthetics. (Improvements, Applicant's Exhibit 15; N.T. at 26-37).

15. Mr. Barry Rush testified that Applicant has installed many wall-wrap displays throughout the United States, including one for the Los Angeles Contemporary Museum of Art. Mr. Rush explained that the subject property's wall-wrap is currently advertising the Gap, a national retailer with nine (9) or eleven (11) stores located in and around the City of Philadelphia. (N.T. at 38-44).

16. The Zoning Board has received and considered a report from Tantala Associates regarding the impact that outdoor advertising signs have on traffic safety. The report indicates that there is no correlation between outdoor

advertising signs and traffic safety concerns. (Tantala Traffic Report, Applicant's Exhibit 11).

17. The Zoning Board has received and considered a letter in support of Applicant's proposed sign from the Outdoor Advertising Association of America, Inc. (Letter dated 3/16/99 from Myron Laible).

18. The Zoning Board heard and considered the testimony in opposition to Applicant's proposed sign from Ann Butchart, the president of the Kensington South Neighborhood Advisory Council (N.T. at 47-48; Letter dated 4/5/00 from Ann Butchart).

19. The Zoning Board heard and considered the testimony in opposition to Applicant's proposed sign from Rick Thom, the representative for Olde City Civic Association, the neighborhood association which represents the subject area (N.T. at 49).

20. The Zoning Board heard and considered the testimony in opposition to Applicant's proposed sign from Mary Tracy, a taxpayer and the Executive Director of the Society Created to Reduce Urban Blight (SCRUB) ("Appellant"). (N.T. at 50-54).

21. The Zoning Board heard and considered the testimony and received a report from Gray Smith in opposition to Applicant's proposed sign. (N.T. at 58-67; Gray Smith Report, Protestant's Exhibit 1).

22. The Zoning Board has heard and considered a letter from the City of Philadelphia Planning Commission recommending that Applicant's requested variances not be granted. (Letter from Maxine Griffith dated 2/20/01).

CONCLUSIONS OF LAW

1. The Zoning Code does not permit outdoor advertising signs on a property zoned L-4 Industrial. Section 14-506(1)(a)(2). The subject property is zoned L-4 Industrial. In order to legalize its existing wall-wrap, Applicant proposes

to erect one (1), non-accessory, flat-wall, outdoor advertising sign an the subject property. Therefore, Applicant's proposal does not conform to the use regulations for the district.

2. The Zoning Code sets forth that in all areas of the City of Philadelphia, the bottom edge of any outdoor advertising sign shall not be located more than twenty-five (25) feet above the road surface from which the advertising message is visible and that in no case shall the sign extend more than twenty (20) feet in height above the sign's bottom edge. Section 14-1604(6)(a). Applicant proposes that the bottom edge of its outdoor advertising sign would measure 45 feet above the surface of Willow Street and that the top edge of its proposed sign would measure 65 feet above its bottom edge. Therefore, Applicant's proposal does not conform to this height regulation

3. The Zoning Code sets forth that the maximum sign area of an outdoor advertising sign with frontages along a street which is less than sixty (60) feet in width shall be 1,000 square feet. Section 14-1604(5). Applicant's proposed outdoor advertising sign would front Willow Street, which has a width of less than 60 feet as determined by L&I, and would have a total sign area of 9,750 square feet. Therefore, Applicant's proposal does not conform to this outdoor advertising regulations

4. The Zoning Code prohibits outdoor advertising signs on any property located within the Vine Street Parkway Special Control Area Section 14-1604.1(5). Applicant's proposed sign would be located within this prohibited area. Therefore, Applicant's proposal is prohibited by this special outdoor advertising regulation.

5. The Zoning Code requires that as a condition for the issuance of a permit to erect an outdoor advertising sign, an existing sign, encompassing an equal or greater sign area, shall be removed by the applicant. Section 14-1604(10)(a). Applicant's proposed outdoor advertising sign would have a

total sign area of 9,750 square feet. Although Applicant proposes to remove ten (10) existing outdoor advertising signs, the total sign area to be removed would be only 1,478 square feet. Therefore, Applicant's proposal does not conform to this outdoor advertising regulation.

6. Accordingly, for all the foregoing reasons, Applicant's proposed outdoor advertising sign may be permitted only if the criteria for granting a variance are met.

7. To establish entitlement to a variance, an applicant must show an unnecessary hardship resulting from the property's unique physical conditions or circumstances; that such hardship is not self-imposed by the applicant; that granting the variance would not adversely impact the public health, safety or welfare; and the variance, if granted, would represent the minimum necessary to afford relief. *See* Philadelphia Code, 14-1802(1); *Alpine, Inc. v. Abington Tp. Zoning Hearing Board* 654 A.2d 186 (Pa. Cmwlth 1995); *Carman v. Zoning Bd. of Adjustment,* 638 A.2d 365 (Pa. Cmwlth. 1994).

8. When determining whether an unnecessary hardship exists, the fact finder must consider if the variance sought is dimensional or use. A dimensional variance involves a request by an applicant to adjust zoning regulations in order to utilize property in a manner consistent with applicable regulations. In contrast, a use variance involves a request by an applicant to use property in a manner that is wholly outside zoning regulations. As a result, the quantum of proof required to establish an unnecessary hardship is greater when an applicant requests a use variance. *See Hertzberg v. Zoning Board of Adjustment,* 554 Pa. 249, 257, 721 A.2d 43, 47 (1998). Regardless whether the request is for a use or a dimensional variance, an applicant is not required to establish that the property is valueless without the variance in order to establish the requisite hardship. *Id.* at 259, 721 A.2d at 48.

9. In the present case, Applicant is requesting both zoning and use variances for the subject property. The Zoning Board concludes that there is the requisite unnecessary hardship supporting both zoning and use variances. In this regards, it is significant that the property's owner could raise the revenue needed to repair the exterior of its seven-story structure only by granting Applicant permission to erect an outdoor advertising sign. In other words, but for Applicant's wall-wrap, the property would not be able to be used by its owner, and therefore, it would have no value.

10. The hardship is not self-imposed by Applicant.

11. The variances are the minimum necessary to afford relief to Applicant.

12. Applicant has persuasively established that its proposed outdoor advertising sign would not adversely impact the public health, safety or welfare. In this regard, it is significant that due to the material used, Applicant's wall-wrap does not impair the flow of light or air to the property and does not create a fire safety concern. Furthermore, Mr. Tantala's traffic safety report establishes that Applicant's wall-wrap would not have a detrimental impact on traffic safety.

13. For all the foregoing reasons, the Zoning Board voted, at Calendar 00-0250, to grant zoning and use variances for the property located at 413-53 North 7th Street, Philadelphia, Pennsylvania

Respectfully submitted,

/s/ Robert J. D'Agostino

Robert J. D'Agostino
Administrator
Zoning Board of Adjustment

VOTE OF THE BOARD

THOMAS J. KELLY	YES
THOMAS D. LOGAN	YES
REVEREND WILLIAM HALL	NO
DAVID L. AUSPITZ	YES
ELEANOR M. DEZZI	YES

§14-506. "L-4" Limited Industrial District. [*Note 195*]

(1) *Use Regulations.* The specific uses permitted in this district shall be the erection, construction, alteration or use of buildings, structures, and/or land for the following uses, to be conducted wholly within a completely enclosed building, or an inner court, except for off-street parking and loading incidental to the use, and the uses specified in paragraphs (a), (k) and (t) below:

(a) The uses permitted in any Commercial District, except as follows: [*Note 196*]

(.1) Dwellings, except such as are used for the residence of a caretaker, watchman, or custodian on the same lot with the principal use and located at least ten feet from any other buildings;

(.2) Outdoor advertising signs;

(.3) Uses requiring a Zoning Board of Adjustment Certificate in any Commercial District shall require a Zoning Board of Adjustment Certificate in this district;

(.4) When any use is herein defined, listed or prohibited, the regulations of this district shall apply;

(.5) Any dance hall, nightclub or restaurant located within the area set forth in Section 14-312(1)(a) shall comply with the parking requirements set forth in Section 14-312(1)(b). [*Note 197*]

(b) Bottling, canning and/or distribution of liquids for human consumption, including the manufacture of soft drinks and carbonated waters;

(c) Building material storage, carpenter, plumbing, roofing and heating shops; provided, there is no open air storage of materials;

(d) Carpet cleaning and repairing;

(e) Central heating plant;

(f) Cinema, radio and television studio; radio and television transmission tower, provided a Zoning Board of Adjustment Certificate is obtained;

(g) Die cutting of purchased paper, purchased paperboard or purchased cardboard; pressing and moulding of purchased paper pulp goods; printing and embossing of purchased wallpaper stock; excluding any manufacture or processing of pulp, waste paper, or waste paper products;

(h) Distribution plants, parcel delivery, cold storage plants, and food commissaries;

(i) Drying, dehydrating and/or packaging of fruits and vegetables; and the freezing of fruits, fruit juices, vegetables and meats and the packaging of such frozen products;

(j) Laundry and dry cleaning;

(k) Water booster or sewer booster substations, telephone exchange buildings, railroad passenger stations, electric transforming or gas regulating substations; provided, that any facilities used in connection with an electric transforming or gas regulating substation located in the open air shall:

(.1) Not be within 50 feet of any Residential District;

(.2) Have a green belt at least 4 feet high containing evergreens, shrubbery and/or trees to be planted and maintained in an area at least ten feet in depth around the entire inside perimeter of the lot, except at points of ingress or egress;

(l) Laboratories (analytical, chemical, and research) and assay offices, not to exceed 5,000 square feet in gross floor area; provided that any laboratory animals shall be kept within completely enclosed buildings at all times;

(m) Manufacture of:

(.1) Advertising displays and signs;

(.2) Apparel and garments of all sorts; lace, linen and fur goods; textile raincoats and outer garments of textile; apparel accessories; curtains, draperies and textile house furnishings; canvas products; trimmings, stamped art goods and needlework; embroideries; pleatings, stitchings and tuckings; felt goods; and other kindred textile articles;

(.3) Automatic merchandising and amusement machines;

(.4) Bread and other bakery products;

(.5) Butter, cheese, condensed and evaporated milk, ice cream and frozen desserts, and special dairy products;

(.6) Candy, chocolate, cocoa, chewing gum, and other confectionery products;

(.7) Cigarettes, cigars, smoking and chewing tobacco, and snuff;

(.8) Cleaning, polishing and sanitation preparations (excluding soap and detergents); provided, a Zoning Board of Adjustment Certificate is obtained;

(.9) Drugs, including biological products, botanical products; medicines and pharmaceutical preparations;

(.10) Electrical measuring instruments and test equipment; switchgear and switchboard apparatus; electrical industrial controls; electrical welding apparatus; electrical household appliances, electrical wiring and wiring equipment (including light bulbs and lighting fixtures); radio and television receiving sets; communication equipment; X-ray apparatus and tubes; electrical equipment for internal combustion engines, and kindred electrical components and products; provided, that no process involving coating with rubber shall be permitted in this district;

(.11) Engineering, laboratory, scientific and research instruments; mechanical measuring and controlling instruments; automatic temperature controls; optical instruments and lenses; surgical, medical, and dental instruments and supplies; ophthalmic goods; watches, clocks, clockwork operated devices and watch cases; sighting and gunnery fire-control equipment; provided, that any fully assembled product regularly produced by any use in this subparagraph shall not exceed 2,000 pounds in weight, except on approval of the Zoning Board of Adjustment;

(.12) Furniture, partitions, shelving, lockers, office and store fixtures, venetian blinds and window shades;

(.13) Games, toys, children's vehicles, sporting, and athletic goods;

(.14) Paper envelopes and bags; paperboard and fibre boxes, tubes, drums, and containers; other paper and paperboard products; provided, that the products herein shall be made from purchased paper, purchased paperboard, or purchased fibre board; and provided further, that the manufacture or processing of pulp, waste paper or waste paper products is prohibited;

(.15) Jewelry; jewelers' findings and materials; lapidary work (including the cutting and polishing of diamonds); dolls; pens, pen points, mechanical pencils and parts; hand stamps, stationery seals, stencils, costume jewelry and costume novelties; ornamental feathers, plumes and artificial flowers; needles, pins and fasteners; lamp shades (except of glass or metal); umbrellas, parasols, and canes; tobacco pipes and cigarette holders; scale models; insignia, emblems and badges;

(.16) Leather gloves and mittens, luggage, handbags and personal leather goods, excluding footwear and saddlery;

(.17) Lead pencils; crayons; kindred artist materials; carbon paper; inked ribbons; steel letters; and figures for marking;

(.18) Macaroni, spaghetti, vermicelli, ravioli and noodles;

(.19) Statuary and art goods made of plaster of Paris or papier-machce;

(.20) Typewriters, computing and accounting machines (including cash registers); scales and balances; and other office machines;

(.21) Rope and twine, except if made of jute or sisal;

(.22) Musical instruments and parts;

(.23) Photographic equipment and supplies, including processing of films;

(n) Milk and cream processing and distribution;

(o) Offices and office record storage;

(p) Plastic articles from purchased plastic materials; provided, that no pressure molding or casting shall be permitted;

(q) Police and fire stations;

(r) Printing, publishing, and allied arts and trades;

(s) Repair of any products permitted to be manufactured or produced in this district; provided, that this paragraph shall not be construed to limit repair uses specifically permitted in any Commercial District;

(t) Rail freight, truck terminal or other similar necessary public utility uses; provided that any facilities used in connection therewith located in the open air shall:

(.1) Not be within 100 feet of any Residential District;

(.2) Have a green belt at least four feet high containing evergreens, shrubbery and/or areas to be planted and maintained in an area at least ten feet in depth along any boundary of the lot facing a Residential District;

(u) Storage buildings and warehouses, not including storage and baling of junk, scrap metal, rags, waste paper or used rubber;

(v) Accessory uses, customarily incidental to any of the above permitted uses.

(2) *Use Conditions.* The above uses are permitted only when the following conditions are met:

(a) All uses in this district shall be carried on exclusively with off-site prepared ingredients and/or materials;

(b) Except as herein defined, listed, or permitted, all General Industrial or Least Restricted uses shall be prohibited;

(c) No kiln shall be fired except by oil, gas or electricity, and no individual kiln capacity shall exceed 200 cubic feet;

(d) No blast or reverberatory furnaces, or foundries shall be used,

(c) No punch or stamping presses over 20 tons rated capacity shall be used;

(f) No drop hammers shall be used;

(g) Any flood light shall be focused onto the property, and no combustion or welding shall be visible beyond the lot lines;

(h) Where any fully assembled product regularly produced by any use under Section (1) above exceeds 2,000 pounds in weight, such use shall require a Zoning Board of Adjustment Certificate.

(3) *Area Regulations.*

(a) *Occupied area.* Subject to the other provisions of this section, buildings may occupy 100% of the lot area.

(b) *Yards.*

(.1) *Front.* No front yard shall be required.

(.2) *Side.* No side yard shall be required, but if any is used, it shall be a minimum width of 8 feet.

(.3) *Rear.* No rear yard shall be required, but if any is used, it shall have a minimum depth of 8 feet.

(c) *Courts.* The minimum width of a court between wings of the same building shall be 12 feet. The least dimension of an inner court shall be 8 feet, and such court shall contain a minimum area of 100 square feet.

(4) *Height Regulations.* The maximum height of any structure shall be 60 feet above the average ground level at the base of the structure.

(5) *Floor Area.* No building in this district shall have a gross floor area greater than 500% of the area of the lot.

(6) *Off-street Loading.* Off-street loading spaces shall be provided in accordance with Chapter 14-1400 of this Title.

(7) *Off-street Parking.* No off-street parking shall be required in this district.

(8) *Signs.* Signs shall be permitted in this district only under the following conditions:

(a) Signs shall pertain to the permitted use of the building.

(b) Signs shall not be erected nor project above the roof line or wall coping.

(c) Lots facing one street line shall be permitted a sign area of three square feet for each lineal foot of street line.

(d) Lots facing more than one street line shall be permitted a sign area upon each street line.

(.1) The shorter street line frontage shall be permitted a sign area of three square feet for each lineal foot of street line.

(.2) The longer street line frontage shall be permitted a sign area of two square feet for each lineal foot of street line; provided, that in no case shall the total sign area on the longer street line frontage be less than the equivalent sign area permitted upon the shorter street line frontage.

(.3) Where a lot has two or more short and/or long street line frontages, the provisions of (.1) and (.2) shall apply to each of said street frontages.

(e) The sign areas permitted in subparagraph (d) above may be cumulated and located on any street frontage; provided, that the total sign area permitted for the lot is not exceeded.

(f) Signs which are free-standing structures on the ground shall not exceed 20 feet in height, measured from the average level of the ground of the lot to the top of said structure.

(g) Signs may be animated or illuminated; provided, that the illumination shall be focused upon the sign itself, so as to prevent glare upon the surrounding areas.

(h) Signs with flashing or intermittent illumination shall not be erected within 100 feet of any Residential District, nor facing any Residential District within 200 feet of the sign.

(i) Signs which revolve shall require a Certificate from the Zoning Board of Adjustment.

(j) Any revolving device which causes intermittent flashes of light to be projected shall be prohibited.

§14-1604. Outdoor Advertising and Non-Accessory Advertising Controls. [*Note 273*]

(1) *Legislative Findings.* The Council finds that:

(a) Existing zoning controls have done little to prevent the City-wide proliferation of commercial outdoor advertising signs.

(b) The excessive number of commercial outdoor advertising signs contribute to visual clutter and detract from the aesthetic beauty of the City of Philadelphia.

(c) Such signs are commercial by nature and while they may be appropriately located in certain commercial and industrial areas, they do not belong, within or in close proximity to residential neighborhoods.

(d) An examination of existing signs located in residential neighborhoods indicates a high concentration of beer, liquor and cigarette advertisements, particularly in close proximity to schools, playgrounds and parks.

(e) This pattern of sign placement would seem to indicate a conscious effort to promote the use of these products by children who attend neighborhood schools and use neighborhood recreation facilities. Therefore, such signs pose a serious threat to the health and welfare of children in the City.

(f) The proliferation of commercial outdoor advertising signs contribute to the appearance of deterioration of commercial and industrial areas of the City and therefore negatively impact upon the economic viability of these areas.

(g) Said signs jeopardize public safety by distracting pedestrians and to a greater extent passing motorists, since these signs by their nature are erected in areas intended to be seen by drivers of motor vehicles.

(h) Regulation and removal of these signs will promote traffic safety by eliminating the hazards to

pedestrians and motorists posed by distracting and confusing sign displays.

(i) Regulation and removal of these signs will enhance the aesthetic beauty of the City of Philadelphia by promoting signs which are harmonious with the streetscape and by eliminating signs which dominate or obscure views of the City.

(j) Regulation and removal of these signs will protect public and private investment, promote economic development and commercial revitalization.

(k) There are few, if any, circumstances under which the prohibition of these signs will render property valueless, result in unnecessary hardship or otherwise meet the criteria for a variance stated in Section 14-1802.

(l) Similar reasons have caused the Council to bar most commercial outdoor advertising and commercial non-accessory signs along and/or within the following: the major gateway approaches and bridges leading to Center City; the Benjamin Franklin Parkway; the Vine Street Parkway; the Southwark and Main Street Manayunk National Historic Districts; and nine (9) commercial revitalization areas located throughout the City.

(m) Therefore, special sign controls amending Section 14-1604 by providing for the removal of unsightly, distracting signs and setting forth the requirements for acceptable signage are required to promote traffic safety, protect views, minimize sign pollution and protect the historic, cultural, aesthetic, and economic vitality of the City of Philadelphia.

(2) *Scope.* These controls shall apply to all areas of the City with special restrictions regulating size, height, illumination, distances from residences, spacing, prohibition and conditions for obtaining permits. These controls shall supplement all provisions of this Title.

(3) *Spacing Requirements.* In all areas of the City, outdoor advertising signs and non-accessory signs shall not be permitted within five hundred feet of any other outdoor advertising sign. This spacing requirement shall not apply to on-premise or accessory signs, non-commercial signs, and highway directional signs.

(4) *Distances from Residentially-Zoned property.* No sign support structure or sign face shall be erected within three hundred feet of any residentially-zoned property.

(5) *Area Regulations.* The maximum sign area of any outdoor advertising sign shall be as follows:

(a) For frontages along a street or right-of-way which are less than sixty feet in width, one thousand square feet per sign support structure.

(b) For frontages along a street or right-of-way which are sixty feet or more in width, one thousand five hundred square feet per sign support structure.

(6) *Height Regulations.*

(a) The bottom edge of any outdoor advertising sign shall not be located more than twenty-five feet above the road surface from which the advertising message is visible and further provided, that in no case shall the sign extend more than twenty feet in height above its bottom edge.

(b) When an outdoor advertising sign is to be erected such that it would be located within one hundred fifty feet of two (2) or more street, road, highway or bridge surfaces, the maximum height of an outdoor advertising sign shall be measured from the surface with the lowest grade elevation.

(c) Where other provisions of The Philadelphia Code are more restrictive than this Section in terms of height regulations, the more restrictive height regulations shall apply for outdoor advertising and non-accessory signs whether such signs are free standing or roof signs.

(7) *Sign Face Regulations.* No more than two (2) sign faces or advertising messages shall be permitted on any one (1) lot; provided, that no more than one (1) sign support structure shall be permitted on any lot.

(8) *Illuminated, Animated, Flashing, and Revolving Sign Regulations.*

(a) Signs may be illuminated; provided, that the illumination shall be focused upon the sign itself, so as to prevent glare upon the surrounding areas.

(b) Flashing signs, signs with intermittent illumination, or signs with mechanically or electronically changing messages shall neither be erected within five hundred feet of any residential district, nor face any residential district within one thousand feet of the sign.

(c) Signs which revolve shall require a certificate from the Zoning Board of Adjustment.

(9) *Prohibited Areas.* Outdoor advertising signs and non-accessory signs shall be prohibited:

(a) Within six hundred sixty feet of all the bridges over the Schuylkill River from the Girard Point Bridge northwestwardly to the Belmont Avenue Bridge;

(b) Within six hundred sixty feet of all ingress and/or egress ramps of the Delaware expressway (I-95), from the Bucks County Line to the Delaware County Line, and the Schuylkill expressway (I-76), between the Montgomery County Line and the Walt Whitman Bridge;

(c) Within six hundred sixty feet of the Benjamin Franklin parkway as defined by the Department of Streets;

(d) Between Twenty-third street and the Schuylkill River from the south side of Race street to Chestnut street;

(e) Between Twenty-fourth street and the Schuylkill River from Chestnut street to South street;

(f) East of Sixth street from South street to the south side of Race street;

(g) Between Sixth street and Delaware avenue from South street to Washington avenue;

(h) Within six hundred sixty feet of the outward edge of the right-of-way lines as defined by the Department of Streets, of the Delaware expressway between Washington avenue and Oregon avenue;

(i) Within six hundred sixty feet of all the bridges over the Delaware River from the Walt Whitman Bridge to the Tacony-Palmyra Bridge;

(j) Within six hundred sixty feet of the outward edge of the right-of-way lines as defined by the Department of Streets, of Woodhaven road;

(k) Within six hundred sixty feet of the outward edge of the right-of-way lines as defined by the Department of Streets, of the Roosevelt boulevard;

(l) Within any area of the City designated as a local or national Historic District;

(m) Within six hundred sixty feet of the outward edge of any park under the jurisdiction of the Fairmount Park Commission, the Commonwealth of Pennsylvania, or the National Park Service;

(n) Within six hundred sixty feet of any park, playground, recreation center, play lot or other recreational facility under the jurisdiction of the Department of Recreation; and,

(o) Within six hundred sixty feet of any public or private pre-school, elementary, middle or high school.

(10) *Conditions For The Issuance of a Permit to Erect Outdoor Advertising and Non-Accessory Signs.*

(a) For each outdoor advertising and non-accessory sign erected in conformance with these provisions, an

existing sign or signs encompassing equal or greater sign area shall be removed.

(b) The application to erect an outdoor advertising or non-accessory sign must specify the size and the location of the sign(s) to be removed. Sufficient proof of the physical existence of the sign(s) to be removed shall be supplied to the Department of Licenses and Inspections. Such proof may be in the form of permits and/or photographs of the existing sign(s).

(c) The application to erect an outdoor advertising or non-accessory sign must also be accompanied by a written authorization from the owner of the property where the sign(s) to be removed are located authorizing the applicant to remove said sign(s) and acknowledging that the right to maintain an outdoor advertising or non-accessory sign is being forfeited through the filing of the application and the issuance of the permit for the erection of the new sign.

(d) No permit for the erection of an outdoor advertising or non-accessory sign shall be issued prior to actual removal of the sign(s) required to be removed as provided in subsections 10(a), (b), and (c) above.

(11) *Signs and Their Supporting Structures.*

(a) The supporting structures for outdoor advertising and non-accessory signs shall conform to the definition of a structure as set forth in Section 14-102(54), shall be considered as such and shall conform to all the requirements regarding structures contained in this Title, provided that Section 14-104 shall not apply to outdoor advertising signs and their structures and therefore such signs may not be extended or reconstructed pursuant to Section 14-104(1) through (13).

(b) Outdoor advertising and non-accessory signs shall be considered as the main use of a property and as a main structure and not as an accessory or ancillary use.

(12) *Removal and Maintenance of Nuisance, Unlawful an Prohibited Signs.*

(a) Nothing in this section is intended to prohibit the Department of Licenses and Inspections from removing a sign at any time without compensation which has been determined to be a public nuisance or unlawfully in existence under any other provision of The Philadelphia Code.

(b) A prohibited sign shall be maintained in good condition, but it shall not be structurally altered so as to enlarge or extend the area or height of the sign. However, a prohibited sign shall not be reconstructed if for any reason it becomes necessary to replace the entire sign, including the sign face, the frame and any supporting mechanism, but excluding the foundation.

(13) *Enforcement.* Whenever any sign is erected, altered, used or maintained in violation of this Section, the Department of Licenses and Inspections shall have the authority to enforce and direct compliance with the provisions of this Section as provided in Section 14-2020.

(14) *Penalties.* In addition to any other sanction or remedial procedure provided, the penalty for violation of any provision of this Section shall be a fine not exceeding one hundred fifty ($150) dollars for each offense, and may include imprisonment not exceeding thirty (30) days if the fine is not paid within ten (10) days. Continuous violation of the same provision shall be a separate violation for each day.

(15) *Severability.* If any provision, sentence, clause, section or part of this Ordinance is for any reason found to be unconstitutional, illegal, or invalid, such unconstitutionality, illegality or invalidity shall not effect or impair any of the remaining provisions, sentences, clauses, sections or parts of this Ordinance. It is the intent of the City Council that this Ordinance would have been adopted had such unconstitutional, illegal or invalid provision, sentence, clause, section or part thereof not been included herein.

§14-1604.1. Special Sign Controls for Area Surrounding the Vine Street Parkway and Benjamin Franklin Bridge Approach. [*Note 274*]

(1) *Legislative Findings.* The Council finds that:

(a) Major public and private investments have been made and continue to be made in the Vine Street Parkway and surrounding areas to improve traffic safety, enhance visual aesthetics, preserve nearby historic and cultural districts, prevent declining property values and encourage economic investment, tourism and the economic vitality of Philadelphia and, in particular, Center City. To date, these public and private expenditures represent a combined investment totalling over one billion ($1,000,000,000) dollars.

(b) Public expenditures have included appropriations for improved vehicular access, street and sidewalk improvements and landscaping. Also, massive reconstruction of the roadway and bridges comprising the Vine Street Parkway has been initiated in a joint effort by local, State and Federal government agencies. When completed, this five-year project will convert the Parkway into a modern state of the art access road on the Federal Interstate Highway System.

(c) Private investments within or immediately adjacent to this area include the Market Street East improvements, the proposed Center City Convention Center, the Gallery shopping complex, Franklintown, the rehabilitation and restoration of Chinatown and nearby residential neighborhoods and the construction of new office building complexes.

(d) The present and future investments have and will continue to raise the ambiance and overall appearance of the Vine Street Parkway to that of such parallel roadways as the Benjamin Franklin Parkway and the Roosevelt Boulevard and will increase the Parkway's prominence as

a major gateway to the City and its historic, cultural and commercial districts.

(e) Consistent with its function as a major gateway to and from the City, traffic studies, commissioned by the City Planning Commission, indicate that immediately prior to the commencement of reconstruction, traffic volume on the Vine Street Parkway averaged eighty thousand (80,000) vehicles per day. Following the completion of construction, this already heavy volume is expected to increase to an estimated one hundred twenty thousand (120,000) vehicles per day.

(f) Within this area, there are a number of unsightly signs, including non-accessory outdoor advertising signs, which detract from the aesthetic beauty of the area, contribute to visual clutter and jeopardize public safety by distracting passing motorists and pedestrians.

(g) Within this area, there are currently approximately seventy-eight (78) non-accessory outdoor advertising signs. Of this total, approximately twenty-five (25) are non-conforming signs under other provisions of this Title. Despite provisions of this Title which encourage the discontinuance of non-conforming uses, very few outdoor advertising signs have been removed.

(h) There are few, if any, circumstances under which the prohibition of these signs will render property valueless, result in unnecessary hardship or otherwise meet the criteria for a variance stated in Section 14-1802.

(i) Regulation and removal of signs will promote traffic safety in the area by eliminating the hazards to pedestrians and motorists posed by distracting and confusing sign displays.

(j) Regulation and removal of signs will enhance the aesthetic beauty of this area by promoting signs that are harmonious with the streetscape and eliminating signs which dominate or obscure views of the City.

(k) Regulation and removal of signs will protect the public and private investment in this area and promote the economic development and commercial revitalization of this area and nearby historic, cultural and commercial districts.

(l) Circumstances similar to those described above have caused Council to bar most outdoor advertising and non-accessory signs along and/or within the following: the major gateway approaches and bridges leading to Center City; the Benjamin Franklin Parkway, the Southwark and Mainstreet Manayunk National Historic Districts; and nine (9) commercial revitalization areas located throughout the City.

(m) Therefore, special sign controls providing for the removal of unsightly, distracting signs and setting forth the requirements for acceptable signage are required to promote traffic safety, protect view corridors, minimize sight pollution and protect the historic, cultural, aesthetic and economic vitality of this area.

(2) *Definitions.* In this Section, the following definitions shall apply:

(a) *Accessory Sign.* A sign containing copy which directs attention to information, identification or advertisements strictly incidental to a lawful use of the premises on which the sign is located. This includes signs or devices indicating the business transacted, services rendered, goods sold or produced on the premises and the name or emblem of the person, firm, institution, organization, or activity occupying the premises.

(b) *Building Logo Sign.* An accessory sign containing copy limited to an identification of the building on which the sign is located, including corporate logos, building names, company names or addresses.

(c) *Non-Commercial Sign.* A sign containing copy limited to a lawful message that does not relate primarily to

the economic interests of the publisher or its audience or direct attention to a business, industry, profession or commodity, product or service offered for sale.

(3) *Vine Street Parkway Area.*

(a) For the purposes of this ordinance, the Vine Street Parkway area shall be that bounded by: the south side of Spring Garden street, projected to the pierhead line of the Delaware River and projected to the pierhead line of the Schuylkill River; the pierhead line of the Schuylkill River to the north side of Race street; the north side of Race street, from the pierhead line of the Schuylkill River projected to the pierhead line of the Delaware River; and the pierhead line of the Delaware River to the south side of Spring Garden street.

(b) No sign shall be erected or altered on any building structure or land located within the Vine Street Parkway area unless the sign complies with the special sign controls stated in this Section.

(4) *Existing Sign Controls.* For the purposes of this Section, when sign controls on any building, structure or upon any land located within the Vine Street Parkway area are more restrictive through other provisions of this Title, this Section shall not be interpreted as superseding those provisions.

(5) *Signs Controls.* All signs as defined by Section 14-102(49) (a) to (1) shall be prohibited on any building, structure or upon any land located within the Vine Street Parkway area, except as follows:

(a) Flat wall accessory and flat wall non-commercial signs shall be permitted at a ratio of two (2) square feet of sign area per lineal foot of street frontage. The top of such flat wall signs shall not extend above the bottom of the second floor of the building on which it is located.

(b) Accessory and non-commercial signs which are free-standing structures on the ground shall be permitted at

a height not to exceed fifteen (15) feet, measured from the average level of the ground to the top of said structure. Free-standing signs shall be permitted a maximum of two (2) sign facings and a maximum of sixteen (16) square feet for each sign facing.

(c) Building logo signs and non-commercial signs which are located above the bottom of the second floor shall be permitted upon approval by the Art Commission; provided, that the Art Commission shall have sixty (60) days to take action after which its approval shall be presumed. The approval of the Art Commission must take into account the impact of the proposed signage on the skyline and view corridors of Center City and the visual aesthetics of the area. Any sign contrary to the goals and objectives of this Ordinance shall be disapproved.

(d) Within the area bounded by the west side of Ninth street, the south side of Winter street, the east side of Eleventh street, and the north side of Race street, projecting accessory and projecting non-commercial signs shall be permitted at a ratio of two (2) square feet of sign area per lineal foot of street frontage. Such signs are in addition to the signs permitted in paragraphs (5)(a) through (5)(c). Such projecting signs shall be subject to Art Commission approval as required by law.

(e) Highway directional signs as defined in Section 14-102 (49)(c) shall be permitted.

(f) Temporary signs providing notice to the public that a property is for sale or for rent shall be permitted so long as such signs do not exceed a total gross area of twenty-five (25) square feet. Temporary non-commercial signs of equivalent size shall also be permitted.

(6) *Grace Period to Remove Prohibited Signs.*

(a) Any sign in existence which does not conform to this Section shall be required to be removed five (5) years after the effective date of this Ordinance; provided, that in

the case of signs subject to the Federal Highway Beautification Act, as amended, 23 U.S.C. Section 131 and the State Outdoor Advertising Control Act of 1971, as amended, 36 P.S. Section 2718.101 et seq., in the event such Acts are amended following the passage of this Ordinance, the five (5) year grace period may be shortened or extended in conformity with those Acts. It is further provided that no sign subject to the aforementioned Federal and State Acts shall be required to be removed until such time as compensation as defined by those Acts is no longer required thereby. Thereafter, such signs shall be removed without compensation to any interested party in accordance with the provisions of this subsection.

(b) Nothing in this subsection is intended to prohibit the Department of Licenses and Inspections from removing a sign at any time without compensation which has been determined to be a public nuisance or unlawfully in existence under any other provision of The Philadelphia Code.

(7) *Continuance of Prohibited signs During Grace Period.* Within the grace period provided in subsection (6), a prohibited sign shall be maintained in good condition, but it shall not be structurally altered so as to enlarge or extend the area or height of the sign. However, no prohibited sign shall be reconstructed if for any reason it becomes necessary to replace the entire sign, including the sign face, the frame and any supporting mechanism, but excluding the foundation.

(8) *Prohibition of Pending Permits.* No permit shall be issued for any sign which will be subject to the provisions of this Section after December 15, 1987, the date Bill No. 1252, predecessor to this legislation, was voted favorably out of the Rules Committee of City Council, following advertisement in two (2) local newspapers of general circulation.

(9) *Enforcement.* Whenever any sign is erected, altered, used or maintained in violation of this Section, the

Department of Licenses and Inspections shall have the authority to enforce and direct compliance with the provisions of this Section as provided in Section 14-2020.

(10) *Penalties.* In addition to any other sanction or remedial procedure provided, the penalty for violation of any provision of this Section shall be a fine not exceeding one hundred fifty ($150.00) dollars for each offense, and may include imprisonment not exceeding thirty (30) days if the fine is not paid within ten (10) days. Continuous violation of the same provision shall be a separate violation for each day.

(11) *Severability.* If any provision, sentence, clause, section or part of this Ordinance is for any reason found to be unconstitutional, illegal or invalid, such unconstitutionality, illegality or invalidity shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of this Ordinance. It is the intent of the City Council that this Ordinance would have been adopted had such unconstitutional, illegal or invalid provision, sentence, clause, section or part thereof not been included herein.

Supreme Court, U.S.
FILED
APR 25 2003

No. 02-1406

In the

Supreme Court of the United States

CALLOWHILL CENTER ASSOCIATES, LLP,

Petitioner,

v.

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), MARY CRAWLEY TRACY, OLD CITY CIVIC ASSOCIATION and KENSINGTON SOUTH NEIGHBORHOOD ADVISORY COUNCIL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COMMONWEALTH COURT OF PENNSYLVANIA

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner waived the issues presented for review by not timely raising the issues before the Philadelphia Zoning Board of Adjustment and not filing a cross appeal from the decision of the Zoning Board.

LIST OF PARTIES

The Petitioner, Callowhill Center Associates, LLP, was the Appellant below.

The Respondents who were the Appellees below are as follows:

Society Created to Reduce Urban Blight (SCRUB)

Mary Crawley Tracy

Old City Civic Association

Kensington South Neighborhood Advisory Council

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Statement of the Case

The Petitioner, Callowhill Center Associates, has petitioned for a Writ of Certiorari to this Honorable Court from the December 17, 2002 Order of the Supreme Court of Pennsylvania denying the Petitioner's Petition for Allowance of Appeal. The issues presented by the Petitioner were waived in the Courts below.

The Petitioner wished to place a huge wall wrap sign around a building located at 413-53 North Seventh Street in Philadelphia, Pennsylvania. This wall wrap sign was absolutely prohibited by Philadelphia Zoning Ordinance 14-1604.

The procedural history is as follows: The application by Callowhill Associates for the grant of the wall wrap was denied by the Philadelphia Department of Licenses and Inspections. A timely appeal was taken by Callowhill Associates. A hearing was held before the Philadelphia Zoning Board of Adjustment on February 14, 2001. Subsequently, the Philadelphia, Zoning Board of Adjustment in a four to one decision granted a variance to allow the sign in the captioned matter. A timely appeal to the Court of Common Pleas of Philadelphia County was filed by the Respondents, Society Created to Reduce Urban Blight (SCRUB), Mary Cawley Tracy, Old City Civic Association and the Kensington South Neighborhood Advisory Council. No cross appeal was filed by the Petitioner, Callowhill Associates. The constitutional issues raised presently by Callowhill were not raised before the Zoning Board.

Oral argument on the appeal was heard before the Honorable Matthew Carafiello of the Court of Common Pleas of Philadelphia County on October 17, 2001. By Order dated November 27, 2001 Judge Carafiello reversed the grant of the variance. The

Petitioner, Callowhill Associates, then filed a timely appeal to the Commonwealth Court of Pennsylvania.

Judge Carrafiello specifically held the constitutional issues raised by the Petitioner had been waived. (14A)

The Commonwealth Court of Pennsylvania, by Opinion dated July 11, 2002, agreed that the constitutional issues raised by the Petitioners had been waived.

> "We agree that Applicants waived all arguments not raised before the Board, including the argument that the Zoning Code is unconstitutional." (7A)

The Commonwealth Court affirmed the decision of Judge Carrafiello reversing the Philadelphia Zoning Board's grant of a variance.

The Petitioner, Callowhill Associates, then petitioned for allowance of appeal to the Pennsylvania Supreme Court. By Order dated December 17, 2002, the Pennsylvania Supreme Court denied the Petition for Allowance of Appeal. The Petitioner then filed the presently pending Petition for Writ of Certiorari with this Honorable Court.

The facts presented during the hearing with the Philadelphia Zoning Board indicated the proposed wall wrap signed violated numerous provisions of Philadelphia Zoning Ordinance 14-1604. The sign grossly exceeded height and size requirements allowed under Zoning Ordinance 14-1604. Further, the sign was prohibited by Philadelphia Zoning Ordinance 14-1604 because it was within the Vine Street Parking Special Control District: The sign was opposed vigorously by

the pertinent civic associations and groups who now make up the Respondents. The Philadelphia Planning Commission also opposed the sign.

The unrefuted evidence demonstrated the building in question where the wrap around sign was proposed was 70-80% occupied with tenants and the building was advertising for additional tenants. The record demonstrated no real hardship. The record also strongly suggested the sign was against public policy as reflected in Philadelphia Zoning Ordinance 14-1604.

Due to the lack of hardship, Judge Carafiello of the Court of Common Pleas reversed the grant of a variance. The Commonwealth Court affirmed. Both Judge Carafiello and the Commonwealth Court held the wall wrap sign fit within the sign definition of the Philadelphia Zoning Ordinance.

Reasons for Denying the Writ

The Respondents, Society Created to Reduce Urban Blight (SCRUB), Mary Cawley Tracy, Old City Civic Association and Kensington South Neighborhood Advisory Council respectfully request the Petition for Writ of Certiorari be denied since the Petitioner, Callowhill Center Associates, waived the issues presented for review by not timely raising the issues before the Philadelphia Zoning Board of Adjustment or by not filing a cross appeal.

The Court of Common Pleas of Philadelphia County agreed and held the constitutional issues presently sought to be raised were waived.

> "As their arguments regarding the constitutionality of the controls

> established by the Code were not raised before the ZBA, nor were they the subject of the appeal before the Court, as well as the Court's belief that they lack merit, they are deemed waived for purposes of this appeal." (14A)

The Commonwealth Court of Pennsylvania agreed the Petitioner, Callowhill Associates waived the issues presented in this Petition for Writ of Certiorari.

> "We agree that Applicants waived all arguments not raised before the Board, including the argument that the zoning code is unconstitutional." (7A)

The Supreme Court of Pennsylvania denied the Petitioner's Request for Allowance of Appeal.

Therefore, there is nothing for this Honorable Court to decide. The lower courts did not address the present constitutional issues due to waiver. The Honorable Court should also dismiss this Petition for Writ of Certiorari since these issues were fully waived and not validly before this Honorable Court.

Conclusion

The Respondents, SCRUB, et al., respectfully requests the Petition for Writ of Certiorari be denied since the issues were waived in the courts below.

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